No. 17-6086

IN THE

Supreme Court of the United States

HERMAN AVERY GUNDY,

Petitioner,

v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF SCHOLARS WHOSE WORK INCLUDES SEX OFFENSE STUDIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

Amici are scholars whose work includes leading studies of persons convicted of sexual offenses and the laws applied to them. *Amici* are concerned that judicial decisions regarding these offenders have sometimes relied upon misunderstandings about the re-offense risks they pose and the impact of laws applied to them. *Amici* wish to provide the Court with accurate information about these subjects. Short biographies of each *amicus* are appended to this brief.[1]

SUMMARY OF ARGUMENT

Discussions of sex offender registration take place against a backdrop of fear and loathing—fear that any change in law or practice that lifts registration requirements will result in great harm to society, and a sense that no restriction is too burdensome for someone who has committed a sex offense. Those on sex offender registries are seen as inveterate criminals who share essential character defects. Bolstering this view are the assumptions—widely shared and often cited by courts—that sex offenders re-offend at rates that are "frightening and high," *Smith v. Doe*, 538 U.S. 84, 103 (2003) (quoting *McKune v. Lile*, 536 U.S. 24, 34 (2002)), and that their risk of re-offense remains high even years after they have been living as law-abiding citizens of their communities. *Id.* at 104.

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1. No counsel for a party authored this brief in whole or in part and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented in writing to the filing of this brief.

Studies show that these assumptions are wrong. Those required to register as sex offenders vary in their traits, life experiences, character, and re-offense risk.[2] The vast majority do not re-offend. Moreover, a newly released offender's re-offense risk can be measured with simple actuarial scales, and that risk drops significantly for each year he spends in the community offense-free. Most offenders convicted before SORNA was enacted in 2006, and who have not re-offended ("pre-act offenders"), are therefore unlikely to commit a new sex offense. They are also unlikely to be free of registration requirements, even if petitioner prevails. States would require them to register, absent some considered policy decision to the contrary. We urge the Court and the parties to account for these facts and to focus on the merits of this case without the fear that clouds so many conversations about sex offenses.

ARGUMENT

Without the benefit of recent empirical research, hundreds of courts have parroted the assumption that registrants re-offend[3] at "frightening and high" rates.[4]

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2. For that reason, we generally use the term "registrant" rather than "sex offender," which can suggest the mistaken assumption that all registrants share a common and immutable character flaw.

3. Because the purpose of registration is to protect the community from new sex offenses, we use the term "re-offend" to refer to the commission of a subsequent sex offense, not to any subsequent offense regardless of whether it is sexual in nature. Studies often provide counts of both.

4. *See* Ira Ellman & Tara Ellman, *"Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime*

With the benefit of such research, much of which has been conducted by *amici*, courts have begun to conclude the opposite. *See Does #1–5 v. Snyder*, 834 F.3d 696, 704 (6th Cir. 2016), *cert. denied*, 138 S. Ct. 55 (2017) ("The record below gives a thorough accounting of the significant doubt cast by recent empirical studies on the pronouncement in *Smith* that '[t]he risk of recidivism posed by sex offenders is 'frightening and high.'"). In the sections that follow, we describe studies that courts have misinterpreted, describe research showing that most pre-act offenders are at a low risk for re-offending, and explain why most pre-act offenders will still be covered by state registration requirements even if petitioner prevails. Given these facts, the Court need not fear that its determination of the constitutional issue presented here will allow dangerous criminals to drop off of registries.

I. Statements about Re-offense Rates of Registrants Are Often Mistakenly Based on Counts of Nonrandom Subgroups.

Courts and policy makers often assume that empirical studies on the re-offense rates of one subgroup of registrants apply equally to all registrants. This assumption is mistaken. The enormous range of offenses that trigger registration requirements ensures that registrants are a heterogeneous group of people whose experiences, characters, and rehabilitative potential vary enormously. One cannot assume that studies that measure

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Statistics, 30 CONST. COMMENT. 495, 497 (2015) (noting that the phrase "frightening and high" was found in 91 judicial opinions and briefs in 101 cases). A Lexis case search for the phrase now results in 118 hits.

re-offense rates among one subgroup of registrants also apply to other subgroups.

Courts frequently miss this important point. For example, *United States v. Kebodeaux*, 570 U.S. 387, 395–96 (2013) acknowledges that some studies conclude that registrants have low recidivism rates, but states:

> There is evidence that recidivism rates among sex offenders are higher than the average for other types of criminals. See Dept. of Justice, Bureau of Justice Statistics, P. Langan, E. Schmitt, & M. Durose, Recidivism of Sex Offenders Released in 1994, p. 1 (Nov. 2003) (reporting that compared to non-sex offenders, released sex offenders were four times more likely to be rearrested for a sex crime, and that within the first three years following release 5.3% of released sex offenders were rearrested for a sex crime).

Because this Department of Justice report refers to its study population as "sex offenders,"[5] it seems reasonable to assume that the report covers all registrants. But it does not. The study population—adult, male, violent offenders released from prison—is in fact a higher-risk group than registrants in general.[6] These inclusion criteria

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5. Patrick A. Langan, Erica L. Schmitt, & Matthew R. Durose, *Recidivism of Sex Offenders Released in 1994*, Bureau of Justice Statistics, Dep't of Justice, at 1 (Nov. 2003) [hereinafter Langan DOJ Study].

6. *Id.* at 1 (noting that everyone in the study population was male), 3 (defining violent offender), 7 (giving age at time of release and noting that "a few" offenders were under age 18).

eliminate juvenile offenders, who are more than a third of those known to the police to have committed sex offenses against a minor.[7] Juveniles have lower re-offense rates,[8] and some subset of them is required to register under SORNA.[9] Those convicted of non-contact offenses are also excluded from the study population.[10] Most importantly, this study population—like those of many re-offense rate

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7. David Finkelhor, Richard Ormrod & Mark Chaffin, *Juveniles Who Commit Sex Offenses Against Minors*, Juvenile Justice Bulletin, Office of Juvenile Justice and Delinquency Prevention, Dep't of Justice at 3 (Dec. 2009). About half of juvenile sex offenders (that is, those reported as offenders in the National Incident-Based Reporting System) are between 15 and 17 years old. *Id.* at 1, 4.

8. *See, e.g.*, the studies gathered in *In re J.B.*, 107 A.3d 1, 17–18 (Pa. 2014).

9. SORNA requires compliant states to impose registration requirements on many juvenile offenders over 14, 34 U.S.C. § 20911(8), although some states have chosen not to comply with this requirement. *See, e.g.*, *In re J.B.*, 107 A.3d at 3; *see also* Sex Offender Registration and Notification Act (SORNA) State and Territory Implementation Progress Check, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, Dep't of Justice, Apr. 5, 2018, https://www.smart.gov/pdfs/SORNA-progress-check.pdf. Juveniles who commit sex offenses have been subject to lifetime registration. *In re J.C.*, 221 Cal. Rptr. 3d 579 (Cal. Ct. App. 2017) (12-year old subject to lifetime registration after sodomy conviction).

10. The study's definition of "violent" was broad, including offenders that "used or threatened force in the commission of the crime" and offenders that "while not actually using force . . .did not have the victim's 'factual' or 'legal' consent. Langan DOJ Study, *supra* note 5, at 3. The study did not, however, include those convicted of non-contact offenses. *Id.*

studies—is limited to individuals "released from State prisons."[11] As a result, it excludes the many registrants who never went to prison but were instead sentenced to probation or a brief stay in a county jail.

Offenders who never went to prison are far more likely to be first-time offenders than those who have served prison terms. Data from New York State show that 95% of those arrested for sex crimes are first-time sex offenders.[12]

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11. *Id.* at 1.

12. *E.g.*, a study of administrative data from New York State found that approximately 95% of sex offense arrestees between 1986 and 2006 were first-time sex offenders. Jeffrey C. Sandler et al., ***Does a Watched Pot Boil? A Time-series Analysis of New York State's Sex Offender Registration and Notification Law,*** 14 PSYCHOL., PUB. POL'Y & L. 284, 297 (2008). A related point was made by researchers who examined the Justice Department's analogous studies of released felons in general (not limited to those convicted of sex offenses), but their analysis applies equally to studies of sex offenders. William Rhodes et al., ***Following Incarceration, Most Released Offenders Never Return to Prison,*** 62(8) CRIME & DELINQ. 1003, 1020 (2014). A *Slate* interview with the authors provides additional context. Leon Neyfakh, ***Why Do So Many Ex-Cons End Up Back in Prison? Maybe They Don't,*** SLATE, Oct. 29, 2015, http://www.slate.com/articles/news_and_politics/crime/2015/10/why_do_so_many_prisoners_end_up_back_in_prison_a_new_study_says_maybe_they.html ("What [the Bureau of Justice Statistics is] reporting is true: If you take people who are released from prison during a given year, here's the rate at which they'll return. But it gets translated in people's heads as, 'Here's what happens to offenders in general.' In truth what you have is two groups of offenders: those who repeatedly do crimes and accumulate in prisons because they get recaptured, reconvicted, and resentenced; and those who are much lower risk, and most of them will go to prison once and not come back.").

By contrast, only 71.5% of the Justice Department sample are first-time sex offenders, and only 21.5% had no prior arrests at all.[13] First-time offenders are less likely to offend again than are those who have already offended more than once, a well-established fact illustrated by the data in this very study: the overall 5.3% re-offense rate for three years, quoted in *Kebodeaux*, is nearly double the re-offense rate for the subgroup of first offenders among them.[14] The higher proportion of repeat offenders among released prisoners means released prisoners will have a higher re-offense rate than will registrants generally. The study cannot be used to make general statements about registrants.

A similar issue arises in *Smith v. Doe*, where this Court considered Alaska's sex offender registration statute, which required registration for either 15 years or for life, depending upon the offense. 538 U.S. at 90. The Court stated:

> The duration of the reporting requirements is not excessive. Empirical research on child molesters, for instance, has shown that, "[c]ontrary to conventional wisdom, most

13. Langan DOJ Study, *supra* note 5, at 26 (Table 27), 28 (Table 30). 78.5% of those in the study were convicted of some prior crime. *Id.* at 26 (Table 27). 28.5% of those in the study were convicted of a prior sex crime. *Id.* at 28 (Table 30).

14. The rate for first offenders in the sample was 3.3%, which is 62% of the 5.3% overall rate. *Id.* at 26–27 (Table 27, Table 29). The re-offense rate was approximately 4% for those with 2 or 3 prior arrests for some type of crime, 6% for those with 4 to 6 prior arrests, 7% for those with 7 to 10 prior arrests, and 8% for those with 11 to 15 prior arrests. *Id.* at 27 (Table 29).

> reoffenses do not occur within the first several years after release," but may occur "as late as 20 years following release." National Institute of Justice, R. Prentky, R. Knight, & A. Lee, U.S. Dept. of Justice, Child Sexual Molestation: Research Issues 14 (1997). *Id.* at 104.

The cited quotation comes from a summary of a study published the same year in a peer-reviewed professional journal. The more complete account provided in the journal article explains that the study sample consisted of 136 rapists and 115 child molesters released from the Massachusetts Treatment Center for Sexually Dangerous Persons, which had been established "for the purpose of evaluating and treating individuals convicted of repetitive and/or aggressive sexual offenses."[15]

In other words, the study did not report the re-offense rates of "child molesters," much less all registrants, but of a subgroup incarcerated in a special facility for sexual offenders presenting a particularly high risk. The paper itself cautions that "[s]exual offenders sampled from general criminal populations, from offenders committed to a state hospital and from a maximum security psychiatric hospital, are likely to differ in ways that would affect their recidivism rates and make cross-sample comparisons difficult."[16] Those who have already re-offended multiple times may present a risk for re-offending again years later, but one cannot assume that risk applies equally

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15. Robert A. Prentky, Austin F. S. Lee, Raymond A. Knight & David Cerce, *Recidivism Rates among Child Molesters and Rapists: A Methodological Analysis*, 21 L. & Hum. Behav. 635, 637–38 (1997).

16. *Id.* at 636 (citations omitted).

to all registrants, or even to all those who commit a sex offense against a child, one third of whom are children themselves.[17] Once again, the study's results cannot be generalized.

II. Re-offense Risk Declines over Time for All Registrant Groups, Including Those Who Are Initially Higher Risk.

One reason the study population matters so greatly in this field of research is that the legal label "sex offender" is applied to a group of people with widely varying psychological traits who present a wide range of re-offense risks. For that same reason, even if one were to construct a study based on a representative sample of all registrants, it would be of limited use to courts and policy makers. There are far more accurate and practical ways to estimate the re-offense risk posed by individual registrants, or by groups of registrants who share a similar risk profile. The most common way is by using the Static-99R, a 10-item actuarial scale that assesses the re-offense risk of adult males who have committed a sex crime.[18] It is the most widely used sex offense risk

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17. *See* Finkelhor et al., *Juveniles Who Commit Sex Offenses*, *supra* note 7, at 1–2.

18. The ten items cover demographics, sexual criminal history (e.g., prior sexual offense), and general criminal history (e.g., prior non-sexual violence). *See, e.g.*, Leslie Helmus, David Thornton, R. Karl Hanson & Kelly M. Babchishin, *Improving the Predictive Accuracy of Static-99 and Static-2002 with Older Sex Offenders: Revised Age Weights*, 24 SEXUAL ABUSE: J. RES. & TREATMENT 64, 65 (2012); *see also* Andrew Harris, Amy Phenix, R. Karl Hanson & David Thornton, *Static-99R Coding Rules* (Revised 2016), http://www.static99.org/pdfdocs/Coding_manual_2016_v2.pdf. Such "structured" risk assessment tools are more accurate

assessment tool in the world.[19] The State of California has commissioned several studies that validated its predictive accuracy for adult males on the California registry.[20]

While the Static-99R is a well-validated instrument for assessing re-offense risk for a newly released offender, that risk level is not static. The most well-established finding in criminology is that the likelihood a released felon will re-offend declines with each year after release he has remained offense-free.[21] "The general tendency for recidivism risk to decline over time is among the best replicated results in empirical criminology. It is probably not an exaggeration to say that any recidivism study with more than a 2- or 3-year follow-up period that did not find a downward-sloping marginal hazard would be immediately suspect."[22]

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than clinical assessments. R. Karl Hanson & Kelly E. Morton-Bourgon, *The Accuracy of Recidivism Risk Assessments for Sexual Offenders: A Meta-Analysis of 118 Prediction Studies*, 21 PSYCHOL. ASSESSMENT 1, 6–8 (2009).

19. *See* Static-99 Clearinghouse, STATIC-99/STATIC-99R, http://www.static99.org/.

20. *E.g.*, R. Karl Hanson, Alyson Lunetta, Amy Phenix, Janet Neeley & Doug Epperson, *The Field Validity of Static-99/R Sex Offender Risk Assessment Tool in California*, 1 J. THREAT ASSESSMENT & MGMT. 102 (2014).

21. Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 CRIMINOLOGY 327 (2009). This now classic study, funded by the Department of Justice, followed 88,000 individuals arrested in New York in 1980. *Id.* at 335.

22. Megan C. Kurlychek, Shawn D. Bushway & Robert Brame, *Long-Term Crime Desistance and Recidivism Patterns–Evidence from the Essex County Convicted Felon Study*, 50 CRIMINOLOGY 71, 75 (2012).

Two widely-cited studies by the developers of the Static-99R show that the same is true for sex offenders. Every year a sex offender remains at liberty without having re-offended reduces the likelihood he will re-offend in the future. This pattern prevails no matter the offender's initial risk level at the time of release. Sex offenders who present a high risk of re-offense at the time of their release also become low-risk with passing years, in predictable trajectories that depend upon their original risk level. Therefore, the pre-act offenders at issue in this case—those who committed a sex offense before July 2006, but not since—are likely to pose far lower re-offense risk than that of registrants in general.[23]

The first of these studies, published in 2014, combined the data from 21 prior studies that had, in total, followed 7,740 adult male sex offenders after their release from custody.[24] The follow-up periods varied with the original

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23. The studies by R. Karl Hanson, et al. discussed infra in this Section effectively rebut the mistaken assumption in the DOJ's Final Rule to SORNA that "the public safety concerns sex offenders present, are similar, whether a sex offender's conviction occurred before or after SORNA's enactment." DOJ Final Rule, Applicability of the Sex Offender Registration and Notification Act, 75 Fed. Reg. 81849, 81851 (adopted Dec. 29, 2010). Some subset of offenders will have committed a sex offense before July 2006, but will have been released only recently, or still be imprisoned. For further discussion on those offenders, see Section III.

24. R. Karl Hanson, Andrew J.R. Harris, Leslie Helmus & David Thornton, *High Risk Sex Offenders May Not Be High Risk Forever*, 29 J. Interpersonal Violence 2792, 2794–95 (2014). This study examined re-offending by adult men only, because the Static-99R has not been validated for women, juveniles, or some non-contact offenders. But similar tools have been developed to measure re-offense risk for these

study. They were 8.2 years on average, but as long as 31 years.[25] The Static-99R was used to classify offenders as High, Moderate, or Low-risk for sexual re-offending at the time of release. The chart reprinted below, taken from the study,[26] shows the proportion in each group who had committed no new sex offense at years 1 to 21 after release. All three groups begin at 1.0, since at the time of release no one had yet re-offended. The Static-99R's predictive power is shown by the separation of the three lines in the years after release. The top line, for low-risk offenders, is at .95 after 20 years—95% of this low-risk group was still offense-free 20 years after release into the community. Of the high-risk group, by contrast, about

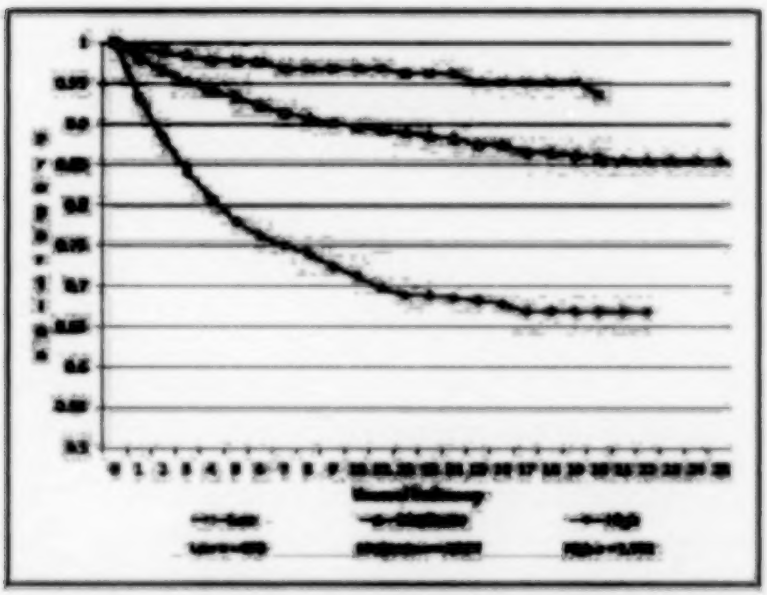
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lower risk groups as well. After California's SARATSO committee adopted the Static-99R as the official risk assessment tool for adult males, it developed and adopted an analogous tool for juvenile males, the JSORRAT-II. *See* Sex Offender Risk Assessment in California, SARATSO, http://www.saratso.org/docs/RA_summary_for_judges_attys_rev_1-3-17.pdf ("[The SARATSO committee] chooses the official risk assessment instruments authorized for use in California. ([Calif.] Pen. Code, § 290.04."). (SARATSO is an acronym for "State Authorized Risk Assessment Tool for Sex Offenders.") Other researchers have developed an analogous tool to predict re-offending among those convicted of possessing child pornography. Michael C. Seto & Angela W. Eke, *Predicting Recidivism Among Adult Male Child Pornography Offenders: Development of the Child Pornography Offender Risk Tool (CPORT)*, 39 L. & Hum. Behav. 416 (2015).

25. In 10 of the 21 studies re-offense was defined as a new conviction for a sex offense; in 11, re-offense was defined as the filing of new sex offense charges. Hanson et al., *High Risk Sex Offenders May Not Be High Risk Forever*, *supra* note 24, at 2797 (Table 1).

26. *Id.* at 2799 (Figure 1).

65% were still offense-free after 20 years. So about 35% of the high-risk group had been charged with or convicted of a new sex offense. But the key finding is how the curves flatten over time. There are fewer and fewer new offenders with each year after release. The proportion who are still offense-free hardly changes at all after about 15 years, because in the years following, there are very few new offenders.



A 2018 paper re-analyzed the data to focus more clearly on the question of how long after release it takes for a legally-compliant offender to be treated as no longer presenting an unacceptable risk of sexual re-offending.[27] For that

27. R. Karl Hanson, Elizabeth Letourneau, Andrew J.R. Harris, L. Maaike Helmus & David Thornton, *Reductions in Risk Based on Time Offense-Free in the Community: Once a Sexual Offender, Not Always a Sexual Offender*, 24 PSYCHOL. PUB. POL'Y & L. 48, 50 (2018).

analysis one must decide on the level of risk to accept—the level to treat as desistance from offending. Because no group in the population presents a zero sex offense risk, one must choose a suitable comparison group with a non-zero risk level. Data on the rate of spontaneous "out of the blue" sexual offending among those with a criminal conviction but no history of sexual offenses suggested to the authors a rate of 2%.[28] Nonsexual offenders are not, of course, placed on sex offender registries. The different treatment of sexual offenders should be based on a perceptably higher risk of sexual offense.

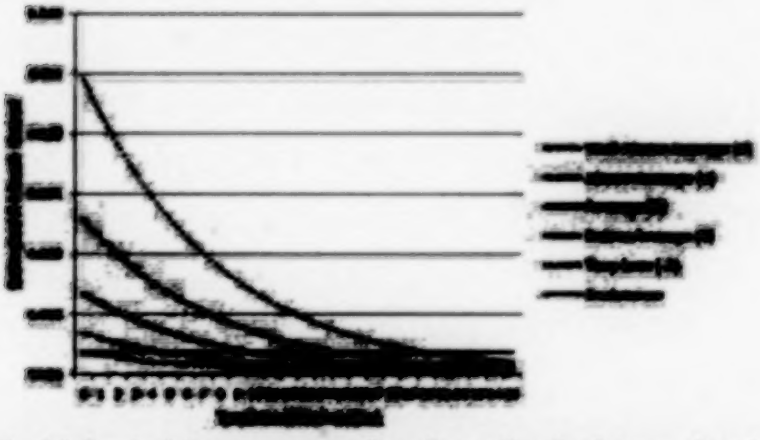
Offenders followed in this study were classified in one of five categories, from "Very Low" through "Well Above Average" risk, on the basis of their Static-99R score.[29] The likelihood of a future sexual offense for those in each category can be adjusted at six-month intervals in the years following release, to reflect the absence of any sexual reoffending up to that point. These "hazard rates" for each of the five risk categories, for a period of 24 years following release, are shown on the chart that

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28. Rachel E. Kahn, Gina Ambroziak, R. Karl Hanson & David Thornton, *Release from the Sex Offender Label*, 46 Archives Sexual Behav. 861, 862 (2017); *see also* Hanson et al., *Reductions in Risk Based on Time Offense-Free*, *supra* note 27, at 49. The article by Kahn et al. found that the median rate of post-release sexual offending for five studies of adult (non-sexual) offenders was 1.30% (range of 0.84–3.18%). *Release from the Sex Offender Label* at 862. The five studies used reconviction as the recidivism criterion. A higher rate would presumably be found in studies using re-arrest as the criterion.

29. Hanson et al., *Reductions in Risk Based on Time Offense-Free*, *supra* note 27 at 51, 54–56.

follows, reproduced from the 2018 study.[30] The horizontal black line shows the 2% "desistance" rate against which each group's hazard rate can be compared.



The highest risk group remains above the desistance level for a long time—about 21 years. But a recent study found that in California only 33 of a random sample of 371 adult male registrants (8.8%) were in this high-risk category.[31] Another 74 (20%) were above average in risk.[32] More than 70% of registrants were thus in the three lower risk categories that reach desistance by the 10th year after release, if they have not reoffended.

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30. *Id.* at 55 (Figure 2).

31. Seung C. Lee, R. Karl Hanson, Nyssa Fullmer, Janet Neeley & Kerry Ramos, ***The Predictive Validity of Static-99R Over 10 Years for Sexual Offenders in California: 2018 Update***, SARATSO 19, http://saratso.org/pdf/Lee_Hanson_Fullmer_Neeley_Ramos_2018_The_Predictive_Validity_of_S_.pdf.

32. *Id.*

The individuals at issue in this case were convicted before July of 2006 and have not since been convicted of a sex offense. We do not know the proportion who have been at liberty for ten years or more, but it must be substantial. We do know that whenever they were released, their risk of offending has been declining since their release. Those just recently released from a pre-2006 conviction would likely have served long terms, which suggests they are older than others at the time of their release—and age itself reduces the risk of sexual re-offense,[33] independently of years at liberty without re-offending.[34] We also know that some would have been in lower risk categories at the time of release, and would thus have reached desistance risk levels within five years. Finally, we know that more of those who would be classified in the highest risk category at the time of their release will soon re-offend, than those in the lower risk category—but that re-offending removes them from the group at issue in this case. That means that the proportion of each year's release "class" who would initially be classified higher risk will decline in the years immediately following their release. In sum, there is good reason to believe that a substantial proportion of the offenders at issue in this case present relatively low risks of committing a new sex offense.

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33. R. Karl Hanson, *Recidivism and Age: Follow-Up Data on 4,673 Sexual Offenders*, 17 J. Interpersonal Violence 1046, 1056, 1059 (2002); Helmus et al., *Revised Age Weights*, *supra* note 18, at 78.

34. Hanson et al., *Reductions in Risk Based on Time Offense-Free in the Community*, *supra* note 27, at 54. The Static-99R score takes account of age at release in estimating the initial risk level. *See* Static-99 Clearinghouse, Static-99/Static-99R, http://www.static99.org/.

III. Eliminating the Attorney General's Rulemaking Authority over Pre-Act Offenders Will Not Result in Inability to Monitor High-Risk Registrants.

Since at least 1996, each state has run its own sex offender registry. *Smith v. Doe*, 538 U.S. at 89–90. Many pre-act offenders will be required to register on state registries regardless of the Court's decision in this case. The only people freed of registration requirements if petitioner prevails would be those who meet two criteria: the states have decided public policy does not require their registration,[35] *and* they have not re-offended since SORNA's enactment—an inherently low-risk group.[36] Because failure to register is a crime in every state, criminal penalties would remain in place for those who disobey state law.[37]

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35. States have made a variety of policy choices about who should be listed on their registries. For example, some states refuse to register juveniles, due in part to a judgment that their rehabilitative potential is high and re-offense risk is low. *See, e.g.*, *In re J.B.*, 107 A.3d at 3; *see also* Wayne A. Logan, *Criminal Justice Federalism and National Sex Offender Policy*, 6 Ohio St. J. Crim. L. 51, 91–94 (2008) (describing state-specific concerns with SORNA's requirements, including concerns about registering juveniles).

36. *See supra* Section II. Those who have been at liberty for some time will be affected by this Court's decision only if they have not reoffended since their release. Those who have served long sentences and only recently been released will almost certainly face state penalties if they fail to register. *See* Sex Offender Enactments Database, National Conference of State Legislatures (Jan. 1, 2018), http://www.ncsl.org/research/civil-and-criminal-justice/sex-offender-enactments-database.aspx.

37. SORNA requires that "Each jurisdiction, other than a Federally recognized Indian tribe, shall provide a criminal

A decision in the petitioner's favor would not have any effect on the National Sex Offender Registry, which "links public state, territorial, and tribal sex offender registries" from a single website.[38] The National Registry would still capture all those on state registries. Nor would a decision in petitioner's favor affect "Operation FALCON," the federal government's program to assist states in locating and apprehending sex offenders who violate registration requirements.[39] Tools for amalgamating and publishing

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penalty that includes a maximum term of imprisonment that is greater than 1 year for the failure of a sex offender to comply with [registration requirements]." 34 U.S.C. § 20913(e). Forty-nine states and the District of Columbia have met this requirement. Sex Offender Registration and Notification Act (SORNA) State and Territory Implementation Progress Check, *supra* note 9. Alaska, though it has not met the requirement to provide criminal penalties greater than a year, nonetheless prosecutes failure to register as a Class C felony under ALASKA STAT. § 11.56.835 (first degree) or a Class A misdemeanor under ALASKA STAT. § 11.56.840 (second degree). *See also* SORNA Substantial Implementation Review State of Alaska, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, Dep't of Justice, at 11 (Nov. 2015), https://www.smart.gov/pdfs/sorna/alaska-hny.pdf.

38. About NSOPW, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, Dep't of Justice, https://www.nsopw.gov/en/Home/About; *see also* 34 U.S.C. § 20921 (establishing the National Sex Offender Registry, "a national database . . . for each sex offender and any other person required to register in a jurisdiction's sex offender registry.").

39. *See* Operation FALCON, U.S. MARSHALS SERVICE, https://www.usmarshals.gov/falcon/; *see also* 34 U.S.C. § 20941(a) ("The Attorney General shall use the resources of Federal law enforcement, including the United States Marshals Service, to assist jurisdictions in locating and apprehending sex offenders who violate sex offender registration requirements.").

registries, and for combating registration violations, would remain in place.

In sum, those affected by the decision in this case present a low risk of re-offending, a high likelihood of being on state registries, or both. Invalidating Congressional delegation of power to the Attorney General in this case will not allow dangerous criminals to slide under the radar of registration requirements.

CONCLUSION

> Risk perception may not be about quantifiable risk so much as it is about immeasurable fear. Our fears are informed by history and economics, by social power and stigma, by myth and nightmares. And as with other strongly held beliefs, our fears are dear to us. When we encounter information that contradicts our beliefs, we tend to doubt the information, not ourselves.[40]

Those words, though written for another context, aptly describe the fear surrounding sex offenders. Registrants are painted with a broad brush, as confirmed criminals who will always be dangerous. But they are individuals whose experiences and character vary enormously. Most Pre-act offenders pose a low re-offense risk, often indistinguishable from the risk that nonsexual offenders

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40. Eula Biss, On Immunity: An Innoculation (2014), as quoted in Jerome Groopman, There's No Way Out of It!, New York Review of Books, Mar. 5, 2015, at 4, *available at* http://www.nybooks.com/articles/2015/03/05/vaccinate-or-not/.

will commit a sex offense. State policies will reasonably relieve a small group of them from a registration obligation. But most Pre-act offenders will continue to be covered by state registration schemes. Fears are not reality, and they should not be allowed to cloud the constitutional issues in this case.

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June 1, 2018

APPENDIX

APPENDIX

Amici are:

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Catherine L. Carpenter is The Honorable Arleigh M. Woods and William T. Woods Professor of Law, Southwestern Law School. She teaches and writes in the area of criminal law. For the last decade, Professor Carpenter's scholarship has focused primarily on the constitutionality of sex offender registration laws. Her work has been cited by courts and attorneys advocating for their clients.

Ira Ellman is Distinguished Affiliated Scholar, Center for the Study of Law and Society, University of California, Berkeley, and Affiliated Faculty of the Berkeley Center for Child and Youth Policy. He was Chief Reporter for the American Law Institute's major project, Principles of the Law of Family Dissolution. His empirical studies with social psychologists have focused on family policy. His 2015 article, *"Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics*, has

been widely discussed in both legal publications and in key national media.

R. Karl Hanson, Ph.D., C.Psych., is one of the leading researchers in the field of risk assessment and treatment for individuals with a history of sexual offending. He has published more than 175 articles, including several highly influential reviews, and has contributed to the development of the most widely used risk assessment tools for individuals with a history of sexual offending (Static-99R; Static-2002R; STABLE-2007). Based in Ottawa, Canada, he worked for Public Safety Canada between 1991 and 2017, a federal department, and retired as Manager of Corrections Research. He is now adjunct faculty in the psychology departments of Carleton University (Ottawa) and Ryerson University (Toronto).

Eric Janus is a professor of law at Mitchell Hamline School of Law, former dean of William Mitchell College of Law, a scholar and expert in sex offender civil commitment laws, author of *Failure to Protect: America's Sexual Predator Laws and the Rise of the Preventive State*, and director of the Sex Offense Litigation and Policy Resource Center, established in 2017.

Richard A. Leo, Ph.D., J.D., is the Hamill Family Professor of Law and Psychology at the University of San Francisco School of Law. He is an expert on police interrogation practices, the impact of Miranda, psychological coercion, false confessions, and the wrongful conviction of the innocent. Dr. Leo has won numerous individual and career achievement awards for research

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Jill S. Levenson, Ph.D., is a Professor of Social Work at Barry University in Miami, Florida. She studies the impact and effectiveness of social policies and therapeutic interventions designed to reduce sexual violence. She has published over 100 articles about sex offender management policies and clinical interventions, including projects funded by the National Institutes of Justice and the National Sexual Violence Resource Center.

Wayne A. Logan is Gary & Sallyn Pajcic Professor, Florida State University College of Law. Professor Logan is the author of *Knowledge as Power: Criminal Registration and Community Notification Laws in America* (Stanford University Press, 2009), cited by the U.S. Supreme Court in *United States v. Kebodeaux*, 570 U.S. 387 (2013), and co-editor (with J.J. Prescott) of *Sex Offender Registration and Community Notification Laws: An Empirical Evaluation* (Cambridge Univ. Press, under contract).

J.J. Prescott, Ph.D., J.D., is an economist and Professor of Law at the University of Michigan where he is co-director of the Empirical Legal Studies Center and the Program in Law and Economics. His recent research includes examination of the ramifications of post-release sex offender laws and the socio-economic consequences of criminal record expungement. The Sixth Circuit Court of Appeals relied upon his work in *Does #1–5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016), *cert. denied*, 138 S. Ct. 55 (2017) in holding that portions of Michigan's sex offender registration law violated the *Ex Post Facto* clause.

Michael Seto, Ph.D., is the forensic research director of the Royal Ottawa Health Care Group. A clinical and forensic psychologist, he has presented and published extensively on the topics of pedophilia, sexual offending, online offending, and risk assessment. He is internationally recognized for this work and has authored two well-reviewed books on these topics published by the American Psychological Association, including his 2013 volume, *Internet Sex Offenders*.

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